

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JILL R. LECKRON,

Plaintiff,

V.

MICHAEL J. ASTRUE, Commissioner of  
Social Security,

Defendant.

Case No. 3:11-cv-05218-RBL-KLS

## REPORT AND RECOMMENDATION

Noted for March 9, 2011

Plaintiff has brought this matter for judicial review of defendant's denial of her

application for disability insurance benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the undersigned submits the following Report and Recommendation for the Court's review, recommending that for the reasons set forth below, defendant's decision to deny benefits should be reversed and this matter should be remanded for further administrative proceedings.

## FACTUAL AND PROCEDURAL HISTORY

On December 1, 2006, plaintiff filed an application for disability insurance benefits,

1 alleging disability as of June 2, 2001, due to depression, attention deficit hyperactivity disorder  
2 (“ADHD”), panic attacks, and anxiety. See Administrative Record (“AR”) 50, 133. Her  
3 application was denied upon initial administrative review and on reconsideration. See AR 50, 65,  
4 76. A hearing was held before an administrative law judge (“ALJ”) on May 13, 2009, at which  
5 plaintiff, represented by counsel, appeared and testified, as did a vocational expert. See AR 12-  
6 44.

7  
8 On June 25, 2009, the ALJ issued a decision in which plaintiff was determined to be not  
9 disabled. See AR 50-64. Plaintiff’s request for review of the ALJ’s decision was denied by the  
10 Appeals Council on January 21, 2011, making the ALJ’s decision defendant’s final decision. See  
11 AR 1; see also 20 C.F.R. § 404.981. On March 22, 2011, plaintiff filed a complaint in this Court  
12 seeking judicial review of the ALJ’s decision. See ECF #1-#3. The administrative record was  
13 filed with the Court on August 29, 2011. See ECF #13. The parties have completed their  
14 briefing, and thus this matter is now ripe for the Court’s review.

15 Plaintiff argues the ALJ’s decision should be reversed and remanded to defendant for an  
16 award of benefits or, in the alternative, for further administrative proceedings, because the ALJ  
17 erred in failing to: (1) properly consider all of her “severe” impairments; (2) properly account for  
18 all of the limitations assessed by Paul Michels, M.D., an examining psychiatrist, and reported by  
19 Teresa Summers, plaintiff’s former supervisor; (3) offer valid reasons for discounting plaintiff’s  
20 credibility; (4) properly assess her residual functional capacity; and (5) find her disabled at step  
21 five of the sequential disability evaluation process.<sup>1</sup> The undersigned agrees the ALJ erred in  
22 determining plaintiff to be not disabled, but, for the reasons set forth below, recommends that  
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25  
26<sup>1</sup> Defendant employs a five-step “sequential evaluation process” to determine whether a claimant is disabled. See 20 C.F.R. § 404.1520. If the claimant is found disabled or not disabled at any particular step thereof, the disability determination is made at that step, and the sequential evaluation process ends. See id.

1 while defendant's decision should be reversed, this matter should be remanded for further  
2 administrative proceedings.

3 DISCUSSION

4 This Court must uphold defendant's determination that plaintiff is not disabled if the  
5 proper legal standards were applied and there is substantial evidence in the record as a whole to  
6 support the determination. See Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986).  
7 Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to  
8 support a conclusion. See Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767  
9 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a preponderance. See  
10 Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v. Sullivan, 772 F.  
11 Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one rational  
12 interpretation, the Court must uphold defendant's decision. See Allen v. Heckler, 749 F.2d 577,  
13 579 (9th Cir. 1984).

14 I. The ALJ's Step Two Determination

15 At step two of the sequential disability evaluation process, the ALJ must determine if an  
16 impairment is "severe." 20 C.F.R. § 404.1520. An impairment is "not severe" if it does not  
17 "significantly limit" a claimant's mental or physical abilities to do basic work activities. 20  
18 C.F.R. § 404.1520(a)(4)(iii), (c); see also Social Security Ruling ("SSR") 96-3p, 1996 WL  
19 374181 \*1. Basic work activities are those "abilities and aptitudes necessary to do most jobs."  
20 20 C.F.R. § 404.1521(b); SSR 85- 28, 1985 WL 56856 \*3.

21 An impairment is not severe only if the evidence establishes a slight abnormality that has  
22 "no more than a minimal effect on an individual['s] ability to work." See SSR 85-28, 1985 WL  
23 56856 \*3; see also Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); Yuckert v. Bowen, 841

1 F.2d 303, 306 (9th Cir.1988). Plaintiff has the burden of proving that her “impairments or their  
2 symptoms affect her ability to perform basic work activities.” Edlund v. Massanari, 253 F.3d  
3 1152, 1159-60 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998). The step  
4 two inquiry described above, however, is a *de minimis* screening device used to dispose of  
5 groundless claims. See Smolen, 80 F.3d at 1290.

6 At step two in this case, the ALJ found plaintiff had severe impairments consisting of  
7 plantar fasciitis, ADHD, a generalized anxiety disorder, a post traumatic stress disorder, and a  
8 major depressive disorder. See AR 52-53. Plaintiff argues the ALJ should have found she had a  
9 severe back impairment at this step as well, relying on her testimony and self-reports regarding  
10 her alleged back-related symptoms and limitations (see AR 23-25, 503), on electro-diagnostic  
11 evidence of a herniated disc (see AR 511, 515) and on one physician’s apparent opinion that she  
12 was not a candidate for back surgery (see AR 515). But the mere existence of an impairment is  
13 insufficient proof of disability or significant work-related limitations stemming from the alleged  
14 impairment. See Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993).

15 The fact that plaintiff is not considered by one physician to be a candidate for surgery is  
16 also an insufficient basis for establishing step two severity. That is, just because plaintiff was not  
17 recommended for one form of treatment, this does not necessarily mean she has any work-related  
18 limitations, without actual evidence of such. Finally, while the ALJ must take into account a  
19 claimant’s alleged pain and other symptoms at step two (see 20 C.F.R. § 404.1529), the severity  
20 determination is made solely on the basis of objective medical evidence:

21 A determination that an impairment(s) is not severe requires a careful  
22 evaluation of the medical findings which describe the impairment(s) and an  
23 informed judgment about its (their) limiting effects on the individual’s  
24 physical and mental ability(ies) to perform basic work activities; thus, an  
25 assessment of function is inherent in the medical evaluation process itself. *At*  
26 *the second step of sequential evaluation, then, medical evidence alone is*

*evaluated in order to assess the effects of the impairment(s) on ability to do basic work activities. . . .*

SSR 85-28, 1985 WL 56856 \*4 (emphasis added). Accordingly, plaintiff has not made the type of evidentiary showing required to establish severity at step two with respect to her alleged back impairment.

## II. The ALJ's Evaluation of the Opinion of Dr. Michels

The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence in the record is not conclusive, “questions of credibility and resolution of conflicts” are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, “the ALJ’s conclusion must be upheld.” Morgan v. Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining whether inconsistencies in the medical evidence “are material (or are in fact inconsistencies at all) and whether certain factors are relevant to discount” the opinions of medical experts “falls within this responsibility.” Id. at 603.

In resolving questions of credibility and conflicts in the evidence, an ALJ's findings "must be supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." Id. The ALJ also may draw inferences "logically flowing from the evidence." Sample, 694 F.2d at 642. Further, the Court itself may draw "specific and legitimate inferences from the ALJ's opinion." Magallanes v. Bowen, 881 F.2d 747, 755, (9th Cir. 1989).

The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.

1 1996). Even when a treating or examining physician's opinion is contradicted, that opinion "can  
2 only be rejected for specific and legitimate reasons that are supported by substantial evidence in  
3 the record." Id. at 830-31. However, the ALJ "need not discuss *all* evidence presented" to him  
4 or her. Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984)  
5 (citation omitted) (emphasis in original). The ALJ must only explain why "significant probative  
6 evidence has been rejected." Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981);  
7 Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).  
8

9 In general, more weight is given to a treating physician's opinion than to the opinions of  
10 those who do not treat the claimant. See Lester, 81 F.3d at 830. On the other hand, an ALJ need  
11 not accept the opinion of a treating physician, "if that opinion is brief, conclusory, and  
12 inadequately supported by clinical findings" or "by the record as a whole." Batson v.  
13 Commissioner of Social Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004); see also Thomas v.  
14 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.  
15 2001). An examining physician's opinion is "entitled to greater weight than the opinion of a  
16 nonexamining physician." Lester, 81 F.3d at 830-31. A non-examining physician's opinion may  
17 constitute substantial evidence if "it is consistent with other independent evidence in the record."  
18 Id. at 830-31; Tonapetyan, 242 F.3d at 1149.  
19

20 In her decision, the ALJ found in relevant part as follows:  
21

22 . . . In a psychiatric evaluation with Paul Michels, M.D.[.] on February 13,  
23 Dr. Michels noted that the claimant drove herself and walked into the  
24 interview room without difficulty (Exhibit 5F). The claimant reported that she  
25 had missed work because of anxiety related to her ADHD, social anxiety,  
26 generalized anxiety disorder, and major depression. The claimant reported  
that she had had panic attacks for over 20 years. The only medication she  
took was Ritalin and Tylenol as needed. She had been in formal mental health  
treatment for year s[sic] with a psychiatrist. She tried therapy and found it not  
helpful. Dr. Michels diagnosed the claimant with major depressive disorder,

1 panic disorder with agoraphobia with a GAF [score] of 50 to 55.<sup>[2]</sup> He said  
2 that her focus and concentration seemed mildly impaired. Her pace and  
3 persistence seem moderately impaired. He concluded that she probably has  
4 the intellectual capacity to understand, remember, and follow complicated or  
5 simple instructions. Her depression and anxiety and difficulties with  
6 interpersonal relationships would likely create troubles completing specific  
7 tasks in a timely or consistent manner. Interactions with others might pose  
8 great difficulty and stress might be met with a pattern of maladaptive coping  
9 which may perpetuate or intensify the underlying depressive and anxiety  
10 symptoms. She did seem to have the basic capacity to manage her finances.  
11 The undersigned has assigned probative weight to the opinion of Dr. Michels  
12 because of his board certification in psychiatry and neurology and because his  
13 opinion is consistent with the medical evidence of record.

14 AR 60-61. As discussed in further detail below, the ALJ assessed plaintiff with the following  
15 mental residual functional capacity (“RFC”):

16       **... She requires simple unskilled work that does not require intense  
17 concentration, although she can remain on task; should have only  
18 minimal interaction with co-workers; brief and superficial contact with  
19 the general public; and routine low stress work that does not involve  
20 frequent changes or adaptations, taking initiative or making independent  
21 decisions.**

22 AR 59 (emphasis in original).

23 Plaintiff argues the above RFC assessment fails to take into adequate account the opinion  
24 of Dr. Michels that “[h]er depression and anxiety and difficulties with interpersonal relationships  
25 would likely create troubles completing specific tasks in a timely or consistent manner.” AR 253.  
26 Defendant argues the ALJ’s assessed limitations on interaction with co-workers and contact with

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2       <sup>2</sup> A GAF score is “a subjective determination based on a scale of 100 to 1 of ‘the [mental health] clinician’s judgment of [a claimant’s] overall level of functioning.’” *Pisciotta v. Astrue*, 500 F.3d 1074, 1076 n.1 (10th Cir. 2007). It is “relevant evidence” of the claimant’s ability to function mentally. *England v. Astrue*, 490 F.3d 1017, 1023, n.8 (8th Cir. 2007). “A GAF of 51-60 indicates ‘[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers).’” *Tagger v. Astrue*, 536 F.Supp.2d 1170, 1173 n.6 (C.D.Cal. 2008) (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-IV”) at 34). “A GAF score of 41-50 indicates ‘[s]erious symptoms . . . [or] serious impairment in social, occupational, or school functioning,’ such as an inability to keep a job.” *Pisciotta*, 500 F.3d at 1076 n.1 (quoting DSM-IV at 34); *see also England*, 490 F.3d at 1023, n.8 (8th Cir. 2007) (GAF score of 50 reflects serious limitations in general ability to perform basic tasks of daily life).

1 the general public and restriction to routine low stress work, adequately accounts for the issues in  
2 completing specific tasks found by Dr. Michels. But Dr. Michels clearly stated that the issues in  
3 completing specific tasks were attributable to plaintiff's depression and anxiety, as well as to her  
4 difficulties with interpersonal relationships. Nor does low stress work or a limitation on contact  
5 with others necessarily take into account the ability to *complete* tasks. Accordingly, the ALJ did  
6 not adequately account for this latter work-related limitation or provide an adequate explanation  
7 as to why it was not included in the RFC assessment.  
8

9 **III. The ALJ's Assessment of Plaintiff's Credibility**

10 Questions of credibility are solely within the control of the ALJ. See Sample, 694 F.2d at  
11 642. The Court should not "second-guess" this credibility determination. Allen, 749 F.2d at 580.  
12 In addition, the Court may not reverse a credibility determination where that determination is  
13 based on contradictory or ambiguous evidence. See id. at 579. That some of the reasons for  
14 discrediting a claimant's testimony should properly be discounted does not render the ALJ's  
15 determination invalid, as long as that determination is supported by substantial evidence.  
16

17 Tonapetyan, 242 F.3d at 1148.

18 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent  
19 reasons for the disbelief." Lester, 81 F.3d at 834 (citation omitted). The ALJ "must identify what  
20 testimony is not credible and what evidence undermines the claimant's complaints." Id.; see also  
21 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the  
22 claimant is malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear  
23 and convincing." Lester, 81 F.2d at 834. The evidence as a whole must support a finding of  
24 malingering. See O'Donnell v. Barnhart, 318 F.3d 811, 818 (8th Cir. 2003).

25 In determining a claimant's credibility, the ALJ may consider "ordinary techniques of

1 credibility evaluation,” such as reputation for lying, prior inconsistent statements concerning  
2 symptoms, and other testimony that “appears less than candid.” Smolen, 80 F.3d at 1284. The  
3 ALJ also may consider a claimant’s work record and observations of physicians and other third  
4 parties regarding the nature, onset, duration, and frequency of symptoms. See id.

5 In this case, the ALJ discounted plaintiff’s credibility in part on the basis that her alleged  
6 disabling symptoms and limitations were inconsistent with the medical evidence in the record.  
7  
8 See AR 60-62; Regennitter v. Commissioner of SSA, 166 F.3d 1294, 1297 (9th Cir. 1998)  
9 (finding that claimant’s complaints are “inconsistent with clinical observations” can satisfy clear  
10 and convincing requirement). As plaintiff has not shown the ALJ’s evaluation of the objective  
11 medical evidence in the record is inconsistent with the ALJ’s assessment of her *physical* residual  
12 functional capacity discussed in further detail below, the ALJ did not err in finding plaintiff to be  
13 not fully credible on this basis.

14 On the other hand, as discussed above, the ALJ did err in evaluating the opinion of Dr.  
15 Michels, and therefore her reliance on the objective medical evidence regarding plaintiff’s  
16 *mental* impairments and limitations to discount her credibility cannot be upheld. Further, a  
17 claimant’s pain testimony may not be rejected “*solely* because the degree of pain alleged is not  
18 supported by objective medical evidence.” Orteza v. Shalala, 50 F.3d 748, 749-50 (9th Cir. 1995)  
19 (quoting Bunnell v. Sullivan, 947 F.2d 341, 346-47 (9th Cir. 1991) (en banc)) (emphasis added);  
20 see also Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001); Fair v. Bowen, 885 F.2d 597,  
21 601 (9th Cir. 1989). The same is true with respect to a claimant’s other subjective complaints as  
22 well. See Byrnes v. Shalala, 60 F.3d 639, 641-42 (9th Cir. 1995) (finding that while Bunnell was  
23 couched in terms of pain complaints, its reasoning also extended to non-pain complaints).

24 The ALJ’s other stated reasons for discounting plaintiff’s credibility, however, cannot

1 withstand scrutiny. Those reasons are as follows:

2

- 3     • **The claimant's exaggeration of subjective complaints and functional**  
4     **limitations undermines the credibility of the claim.** One strong  
5     indication of the credibility of an individual's statements is their  
6     consistency, both internally and with other information in the case record.  
7     This consistency is lacking in the record before the undersigned. As  
8     outlined above, the claimant's essential allegation is that her impairments  
9     are so significant that she cannot perform work activity. Despite these  
10    allegations, the claimant's treatment notes indicate that the claimant was  
11    able to work in 2005, 2006, and in 2007 (Exhibit 1D). She was also able  
12    to play softball and golf in 2007.
- 13     • **The claimant's work history undermines the credibility of the**  
14     **claimant's allegations in this case.** The claimant's earnings record  
15     reflects that she had been able to engage in significant gainful activity  
16     after her alleged disability onset date (Exhibit 1D).<sup>[3]</sup> Such a work history  
17     raises a question as to whether the claimant's continuing unemployment is  
18     actually due to medical impairments.

19     AR 62. While the record may show plaintiff engaged in significant gainful activity during these  
20     years – at least in terms of the amount of money earned (see AR 20, 52, 97-111) – it also shows  
21     she worked in multiple jobs for short periods during that time, including apparently six alone in  
22     2006 (see AR 20, 97-111). This last fact, contrary to defendant's assertion, indicates plaintiff's  
23     ability to engage in full-time employment is compromised.

24     Plaintiff's testimony and the report of Ms. Summers, her former supervisor, also indicate  
25     she was unable to maintain such employment due to her mental impairments. Thus, for example,

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26     <sup>3</sup> As the ALJ noted at step one of the sequential disability evaluation process:

27     The claimant worked after the alleged disability onset date and this work activity did rise to  
28     the level of substantial gainful activity in 2001 and 2006. The claimant's earnings record  
29     reflects the claimant earned \$15,647 in 2001 and \$17,099 in 2006 (Exhibit 1D). Ordinarily,  
30     an individual's earnings from work activities as an employee show that the individual has  
31     engaged in substantial gainful activity if his or her earnings averaged more than \$740.00 per  
32     month or \$8,880 per year beginning January 2001 and more than \$860.00 per month or  
33     \$10,320 per year beginning January 2006. . . .

34     AR 52; see also AR 101-111. Despite determining that plaintiff's "earnings record" reflected that she had "engaged  
35     in substantial gainful activity," the ALJ nevertheless proceeded on with the disability evaluation process. AR 52; see  
36     Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (claimant not entitled to disability benefits for any period of  
37     time during which he or she has engaged in substantial gainful activity); see also 20 C.F.R. § 404.1520(a)(4)(i), (b).

1 plaintiff testified that she was terminated from all six of jobs she had in 2006, because of her  
2 difficulties with interpersonal relationships, and that she had to call in sick “a lot” due to anxiety.  
3 See AR 20-21, 34-35. This is consistent with the opinion of Dr. Michels that “[h]er depression  
4 and anxiety and difficulties with interpersonal relationships would likely create troubles  
5 completing specific tasks in a timely or consistent manner.” AR 253. Further, Teresa Summers,  
6 plaintiff’s former supervisor, reported in the questionnaire she completed that plaintiff “did not  
7 get along with all of her coworkers,” that she “was allowed to miss more work than other staff in  
8 the office” and “adjust her hours to assist in covering missed time” and that “due to her medical  
9 issues she was not here enough to complete the work [Ms. Summers] needed done.” AR 114-15.  
10 Accordingly, it is far from clear that the jobs plaintiff performed during the years of 2005, 2006  
11 and 2007, is sufficient to discount her credibility.  
12

13       Indeed, as noted by plaintiff, the Social Security Administration classified the 2006 jobs  
14 she performed as unsuccessful work attempts. See AR 125. Although plaintiff did testify at one  
15 point in the hearing that she earlier had reported having not worked since 2001 (see AR 21-22),  
16 she testified as well that she performed the other jobs discussed above (see AR 20-21). Further,  
17 while this does indicate some inconsistency in plaintiff’s testimony, the ALJ did not appear to  
18 fault her for that discrepancy or rely on it as a basis for finding her to be not entirely credible.  
19 See *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) (error to affirm credibility decision  
20 based on evidence ALJ did not discuss).  
21

22       As for the ALJ’s statement that plaintiff was “able to play softball and golf in 2007” (AR  
23 62), the only evidence of the nature and extent of her participation in these two activities during  
24 this period is a notation made in early May 2007, and again in early June 2007, that they were  
25 hobbies of hers. See AR 296, 300. To determine whether plaintiff’s symptom complaints are  
26

1 credible, the ALJ may consider her daily activities. Smolen, 80 F.3d at 1284. Such complaints  
2 may be rejected if plaintiff “is able to spend a substantial part of his or her day performing  
3 household chores or other activities that are transferable to a work setting.” Id. at 1284 n.7. She  
4 need not be “utterly incapacitated” to be eligible for disability benefits, though, and “many home  
5 activities may not be easily transferable to a work environment.” Id.

6 A claimant’s activities also can “contradict his [or her] other testimony.” Orn v. Astrue,  
7 495 F.3d 625, 639 (9th Cir. 2007). As indicated, there is no evidence in the record as to exactly  
8 how frequently or for how long plaintiff may have participated in playing softball or golf. See  
9 AR 30 (plaintiff testifying that “the last time [she] played softball was in 2000, and the last time  
10 [she] golfed was probably 2005,” and that she did not “do either right now”); but see AR 236  
11 (reporting in late January 2007, first experiencing sharp pain in her right heel “while golfing  
12 about 1 month prior”, but nevertheless providing no further details in regard thereto). Thus, the  
13 record fails to show plaintiff has spent a substantial part of her day performing those activities or  
14 that they are transferrable to a work setting. For the same reason, the lack of evidence regarding  
15 her ability to play softball and to golf also does not necessarily contradict plaintiff’s testimony  
16 regarding her mental or physical complaints. Accordingly, the ALJ has not provided sufficiently  
17 valid reasons for discounting plaintiff’s credibility in this case.

20 IV. The ALJ’s Evaluation of the Lay Witness Evidence in the Record

21 Lay testimony regarding a claimant’s symptoms “is competent evidence that an ALJ must  
22 take into account,” unless the ALJ “expressly determines to disregard such testimony and gives  
23 reasons germane to each witness for doing so.” Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir.  
24 2001). In rejecting lay testimony, the ALJ need not cite the specific record as long as “arguably  
25 germane reasons” for dismissing the testimony are noted, even though the ALJ does “not clearly  
26

1 link his determination to those reasons,” and substantial evidence supports the ALJ’s decision.

2 Id. at 512. The ALJ also may “draw inferences logically flowing from the evidence.” Sample,  
3 694 F.2d at 642.

4 As discussed above, the record contains a questionnaire completed by Teresa Summers,  
5 in which she sets forth her observations of plaintiff’s job performance and productivity during  
6 the time when she was plaintiff’s supervisor. See AR 114-15. In regard to that questionnaire, the  
7 ALJ found in relevant part as follows:

8 . . . Ms. Summers wrote that the claimant worked for her on a temporary basis  
9 as a billing specialist from July 16, 2006 through October 17, 2006. The  
10 quality of the claimant’s work was very good; it was only the quantity that  
11 was lacking. She wrote that the claimant was a hard worker, not easily  
12 distracted, and she worked best independently. She worked well with the  
13 claimant, but the claimant did not get along with all of her co-workers. The  
14 claimant was able to handle deadlines, changes, and decision making with her  
15 primary workload just fine. She did have issues with changes in the type of  
16 work and did not respond well to uncertainty. Ms. Summers also allowed the  
17 claimant to miss work more than other staff in the office and she was allowed  
18 to adjust her hours to assist in covering the missed time. The claimant was  
19 terminated because the job required a 40-hour a week person and because, due  
20 to the claimant’s medical issues, she was not at work enough to complete the  
21 work that needed to be done. The undersigned has assigned probative weight  
22 to the opinion of Ms. Summers because it is inconsistent with the medical  
23 evidence of record.

24 AR 62. Plaintiff asserts that despite assigning “probative weight” to the questionnaire completed  
25 by Ms. Summers, the ALJ did not account for her report that plaintiff “was allowed to miss more  
26 work than other staff in the office” and “adjust her hours to assist in covering missed time.” AR  
115. In failing to do so, plaintiff argues, the ALJ erred. The undersigned agrees.

27 Defendant argues the other mental limitations the ALJ assessed plaintiff, discussed in  
28 further detail elsewhere herein, “believe the notion that the ALJ did not fairly consider” the specific  
29 statements regarding missed work and adjusted hours. ECF #19, p. 8. The issue here, however,  
30 is not whether the ALJ fairly considered that report, but whether the ALJ properly accounted for

1 them in her decision. Defendant goes on to argue that the ALJ had no obligation to credit those  
2 statements, because Ms. Summers, “as a lay person” had “no knowledge as to why” she “did not  
3 show up enough” at work or “what else” she “may have been capable of doing.” Id. (emphasis in  
4 original). But Ms. Summers was plaintiff’s supervisor, and therefore was in a good position to  
5 observe her performance and to have direct knowledge of the reasons why plaintiff was unable to  
6 maintain a full-time presence at work. Defendant’s argument is thus rejected.  
7

8 **V. The ALJ’s Assessment of Plaintiff’s Residual Functional Capacity**

9 If a disability determination “cannot be made on the basis of medical factors alone at step  
10 three of the evaluation process,” the ALJ must identify the claimant’s “functional limitations and  
11 restrictions” and assess his or her “remaining capacities for work-related activities.” SSR 96-8p,  
12 1996 WL 374184 \*2. A claimant’s residual functional capacity (“RFC”) assessment is used at  
13 step four to determine whether he or she can do his or her past relevant work, and at step five to  
14 determine whether he or she can do other work. See id. It thus is what the claimant “can still do  
15 despite his or her limitations.” Id.

16 A claimant’s residual functional capacity is the maximum amount of work the claimant is  
17 able to perform based on all of the relevant evidence in the record. See id. However, an inability  
18 to work must result from the claimant’s “physical or mental impairment(s).” Id. Thus, the ALJ  
19 must consider only those limitations and restrictions “attributable to medically determinable  
20 impairments.” Id. In assessing a claimant’s RFC, the ALJ also is required to discuss why the  
21 claimant’s “symptom-related functional limitations and restrictions can or cannot reasonably be  
22 accepted as consistent with the medical or other evidence.” Id. at \*7.

23  
24 As noted above, the ALJ assessed plaintiff with the following mental residual functional  
25 capacity (“RFC”):

1                   **... She requires simple unskilled work that does not require intense**  
2                   **concentration, although she can remain on task; should have only**  
3                   **minimal interaction with co-workers; brief and superficial contact with**  
4                   **the general public; and routine low stress work that does not involve**  
5                   **frequent changes or adaptations, taking initiative or making independent**  
6                   **decisions.**

7                   AR 59 (emphasis in original). In addition, the ALJ found plaintiff to be capable of performing  
8                   light work, with the additional physical limitations that she could not climb ladders, ropes or  
9                   scaffolds, and that she could only occasionally climb stairs, crawl, bend, stoop, and twist. See  
10                  AR 59. Plaintiff argues that in light of the errors committed by the ALJ in failing to consider all  
11                  of her severe impairments,<sup>4</sup> in evaluating the opinion of Dr. Michels, in assessing her credibility,  
12                  and in dealing with the lay witness evidence provided by Ms. Summers, a more restrictive RFC  
13                  assessment should have been provided. The undersigned agrees that because the ALJ erred as  
14                  discussed above, it is far from clear that the ALJ's assessment of plaintiff's residual functional  
15                  capacity is entirely accurate. Whether a more restrictive RFC assessment is warranted, however,  
16                  remains to be seen on remand.

17                  VI.     The ALJ's Findings at Step Five

18                  If a claimant cannot perform his or her past relevant work, at step five of the disability  
19                  evaluation process the ALJ must show there are a significant number of jobs in the national  
20                  economy the claimant is able to do. See Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir.  
21                  1999); 20 C.F.R. § 404.1520(d), (e). The ALJ can do this through the testimony of a vocational  
22                  expert or by reference to defendant's Medical-Vocational Guidelines (the "Grids"). Tackett, 180  
23                  F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

24  
25                  

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<sup>4</sup> Specifically, plaintiff argues she should have been found incapable of performing light work due to the limitations  
26                  caused by her back impairment. But because, as discussed above, the ALJ did not err in failing to find she had such  
                        an impairment, or any significant work-related limitations stemming therefrom, she was not obligated to include any  
                        such limitations in his RFC assessment.

1 An ALJ's findings will be upheld if the weight of the medical evidence supports the  
2 hypothetical posed by the ALJ. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987);  
3 Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony  
4 therefore must be reliable in light of the medical evidence to qualify as substantial evidence. See  
5 Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the  
6 claimant's disability "must be accurate, detailed, and supported by the medical record." Id.  
7 (citations omitted). The ALJ, however, may omit from that description those limitations he or  
8 she finds do not exist. See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

10 At the hearing, the ALJ posed a hypothetical question to the vocational expert containing  
11 substantially the same limitations as were included in the ALJ's assessment of plaintiff's residual  
12 functional capacity. See AR 39-40. In response to that question, the vocational expert testified  
13 that an individual with those limitations – and with the same age, education and work experience  
14 as plaintiff – would be able to perform other jobs. See AR 40-41. Based on the testimony of the  
15 vocational expert, the ALJ found plaintiff would be capable of performing other jobs existing in  
16 significant numbers in the national economy. See AR 63-64.

18 Plaintiff argues the vocational expert testified at the hearing that the difficulties she had  
19 in completing specific tasks in a timely or consistent manner Dr. Michels found she had, would  
20 result in an inability to maintain employment. As defendant notes, though, while the vocational  
21 expert testified that an individual who was "unable to complete tasks *at all* . . . [w]ould not be  
22 able to remain employed" (AR 43 (emphasis added)), Dr. Michels merely opined that plaintiff's  
23 depression, anxiety and difficulties with interpersonal relationships "would likely create troubles  
24 completing specific tasks," without further defining the extent of such troubles (AR 253). Thus,  
25 it is far from clear that Dr. Michels felt plaintiff was unable to complete *any* tasks.

1       The undersigned also rejects plaintiff's contention that she should be found incapable of  
2 working on the basis of the report of Ms. Summers that she was not at work enough to be able to  
3 complete the work that needed to be done. Plaintiff asserts that although the vocational expert in  
4 this case did not so specifically testify, vocational experts "routinely testify" that individuals who  
5 missed more than one day of work a month on a regular basis would have difficulty maintaining  
6 employment. ECF #18, p. 16. But the vocational expert in this case did *not* so testify. Nor does  
7 the undersigned find it appropriate to reverse an ALJ's step five finding based on what generally  
8 vocational experts may testify to in regard to employability.

9  
10      That is, the Court must look to the actual evidence before it, rather than conjecture, in  
11 making its decision. In any event, the report of Ms. Summers fails to specify how much work  
12 plaintiff missed, even if plaintiff is correct in her assertion regarding vocational expert testimony  
13 in general on this issue. On the other hand, because as discussed above, the ALJ erred in his  
14 evaluation of the findings of Dr. Michels and the statements of Ms. Summers, in his assessment  
15 of plaintiff's credibility and in his assessment of her residual functional capacity, it is far from  
16 clear that the hypothetical question the ALJ posed to the vocational expert – and thus the ALJ's  
17 step five determination overall – is supported by substantial evidence.

18  
19      VII. This Matter Should Be Remanded for Further Administrative Proceedings

20  
21      The Court may remand this case "either for additional evidence and findings or to award  
22 benefits." Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the  
23 proper course, except in rare circumstances, is to remand to the agency for additional  
24 investigation or explanation." Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations  
25 omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is  
26 unable to perform gainful employment in the national economy," that "remand for an immediate

1 award of benefits is appropriate.” Id.

2 Benefits may be awarded where “the record has been fully developed” and “further  
3 administrative proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan  
4 v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded  
5 where:

6 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
7 claimant’s] evidence, (2) there are no outstanding issues that must be resolved  
8 before a determination of disability can be made, and (3) it is clear from the  
9 record that the ALJ would be required to find the claimant disabled were such  
evidence credited.

10 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002).  
11 Because issues still remain in regard to the medical evidence in the record concerning plaintiff’s  
12 mental limitations, her mental residual functional capacity and her ability to perform other jobs  
13 existing in significant numbers in the national economy, it is appropriate to remand this matter  
14 for further administrative proceedings.

15 Plaintiff argues the evidence the ALJ improperly rejected should be credited as true here.  
16 Where the ALJ has failed “to provide adequate reasons for rejecting the opinion of a treating or  
17 examining physician,” that opinion generally is credited “as a matter of law.” Lester, 81 F.3d at  
18 834 (citation omitted). However, where the ALJ is not required to find the claimant disabled on  
19 crediting of evidence, this constitutes an outstanding issue that must be resolved, and thus the  
20 Smolen test will not be found to have been met. Bunnell v. Barnhart, 336 F.3d 1112, 1116 (9th  
21 Cir. 2003). Further, “[i]n cases where the vocational expert has failed to address a claimant’s  
22 limitations as established by improperly discredited evidence,” the Ninth Circuit “consistently  
23 [has] remanded for further proceedings rather than payment of benefits.” Bunnell, 336 F.3d at  
24 1116. Because, as discussed herein, it is far from clear that the ALJ was required to find plaintiff  
25  
26

1 disabled, and because the vocational expert did not address the mental limitations found by Dr.  
2 Michels that the ALJ failed to properly evaluate, remand for outright payments of benefits is not  
3 warranted at this time.

4 In addition, the Ninth Circuit has held that remand for an award of benefits is required  
5 where the ALJ's reasons for discounting the claimant's credibility are not legally sufficient, *and*  
6 "it is clear from the record that the ALJ would be required to determine the claimant disabled if  
7 he had credited the claimant's testimony." Connett v. Barnhart, 340 F.3d 871, 875 (9th Cir.  
8 2003). The Court of Appeals in Connett went on to state, however, that it was "not convinced"  
9 the "crediting as true" rule was mandatory. Id. Thus, at least where – as in this case for the  
10 reasons discussed herein – findings are insufficient as to whether a claimant's testimony should  
11 be "credited as true," it appears here too the courts "have some flexibility in applying" that rule.  
12 Id.; but see Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004) (applying "crediting as true"  
13 rule, but noting its contrary holding in Connett).<sup>5</sup>

14 Lastly, where lay witness evidence has been improperly rejected, that evidence may be  
15 credited as a matter of law as well. See Schneider v. Barnhart, 223 F.3d 968, 976 (9th Cir. 2000)  
16 (noting that when lay evidence rejected by ALJ was given effect required by federal regulations,  
17 it became clear claimant's limitations were sufficient to meet or equal listed impairment). Again,  
18 though, as noted by the Ninth Circuit, the courts have "some flexibility" in how they apply the  
19 "credit as true" rule, such as where the record fails to definitively establish that a claimant should  
20 be found disabled. Connett, 340 F.3d at 876. Further, Schneider dealt with the situation where  
21  
22

23  
24 \_\_\_\_\_  
25 <sup>5</sup> In Benecke, the Ninth Circuit found the ALJ not only erred in discounting the claimant's credibility, but also with  
26 respect to the evaluations of her treating physicians. 379 F.3d at 594. The Court of Appeals credited both the  
claimant's testimony and her physicians' evaluations as true. Id. It also was clear in that case that remand for further  
administrative proceedings would serve no useful purpose and that the claimant's entitlement to disability benefits  
was established. Id. at 595-96. Such is not the case here.

1 defendant failed to cite any evidence to contradict the statements of five lay witnesses regarding  
2 the claimant's disabling impairments. 223 F.3d at 976.

3 CONCLUSION

4 Based on the foregoing discussion, the undersigned recommends that the Court find the  
5 ALJ improperly concluded plaintiff was not disabled. The undersigned thus recommends as well  
6 that the Court reverse defendant's decision and remand this matter for further administrative  
7 proceedings in accordance with the findings contained herein.  
8

9 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.")  
10 72(b), the parties shall have **fourteen (14) days** from service of this Report and  
11 Recommendation to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file  
12 objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn,  
13 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk  
14 is directed set this matter for consideration on **March 9, 2011**, as noted in the caption.  
15

16 DATED this 17th day of February, 2012.

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20 Karen L. Strombom  
21 United States Magistrate Judge  
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